

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Plaintiff,

v.

Defendant.

:CV

MEDIATION REFERENCE ORDER
(APPROVED MEDIATOR;
CASE STAYED)

In accordance with the court's general orders on court-annexed mediation and the Mediation Plan for this district("Plan"), and after consultation with the parties,

IT IS ORDERED:

1. This case is referred for mediation to

2. Except as otherwise provided herein, all parties and their counsel and any insurance company having an interest shall attend all mediation sessions scheduled by the mediator. At least one person for each party and insurance company shall have full settlement authority.¹ Such persons and

¹This requires the physical presence of the client or if a corporate, governmental, or organizational entity, a representative of the client who has both full settlement authority and the realistic freedom to exercise it without negative consequences. Any insurance company that is contractually required to defend or pay damages or which has a subrogation interest must also have a representative present with full settlement authority. "Full settlement authority" means: (a) for a defendant, the representative must have final authority, in the representative's own discretion, to pay a settlement amount up to plaintiff's last prayer, or up to plaintiff's last demand, whichever is lower; (b) for a plaintiff, such representative must have final authority, in the representative's own discretion, to authorize dismissal of the case with prejudice, or to accept a settlement amount down to defendant's last offer; (c) for a client which is controlled by a group, like a board of directors or a claims committee, the representative must have authority to settle for the group as described above; (d) for an insurance company with a defense or indemnity obligation, the representative must have final authority to commit the company to pay, in the representative's own discretion, an amount up to the plaintiff's last demand or the limits of the policy, whichever is lower; (e) for an insurance company with a subrogation interest in the recovery of a party, the representative must have final settlement authority to commit the company to settle, in the representative's own discretion, by dismissal of the interest with prejudice, or to accept a settlement amount down to the opponent's last offer, whichever is lower. The purpose of this provision is to have at least one person present for each party who has both the authority to exercise his or her own discretion and the realistic freedom to exercise such discretion without negative consequences, to settle the case at the mediation without consulting someone else who is not present.

entities are further ordered to prepare for and participate in the mediation in accordance with the Plan and in objective good faith.

3. In preparing for the mediation, counsel shall:

- a. Confer with their clients to assure compliance with paragraph 2 and 4 of this order;
- b. Confer with opposing counsel to:
 - i. Disclose and resolve any problematic circumstances that might give rise to a contention of lack of full settlement authority or a lack of objective good faith;
 - ii. Exchange proposals for settlement, in accordance with paragraph 4, below; and
 - iii. Confirm their decision to have this action stayed pending the outcome of the mediation in accordance with paragraph 8, below; and
- c. Submit to the mediator a brief (no more than four pages) summary of the case, the client's attitude toward settlement, the history of the parties' prior settlement negotiations, the client's reasons, other than money, to seek settlement, and any other materials requested by the mediator, such as discovery materials and/or case citations. A copy need not be given opposing counsel.

4. Prior to the mediation counsel shall exchange proposals for settlement and discuss their clients' respective aims in settlement. If, as a result of such discussions, counsel for any party is of the view that the parties' positions and interests are so divergent that settlement of the dispute is not realistically possible, counsel shall seek a telephone conference with the undersigned and opposing counsel to determine whether the mediation should be cancelled. Such telephone conference shall be arranged in sufficient time to avoid the incurring of expenses by the parties, representatives, and counsel in attending the mediation session, ordinarily at least three working days before the mediation session. Even if the mediation is cancelled, the parties may be responsible for expenses then incurred by the mediator in accordance with paragraph 7, below.

5. The parties and counsel are reminded that the court may impose sanctions, including dismissal of a claim or defense, monetary sanctions, or such other sanctions as may be authorized by Fed. R. Civ. P. 16(f), should such persons or entities fail to comply with this order in objective good faith.

6. Any objection to this order shall be filed within seven working days, and shall comply with paragraph 3(f) of the Plan. A copy shall be served on the mediator.

7. The cost of the mediation shall be borne by the parties to the mediation at the rate established by the mediator. The mediator may charge the parties a non-refundable scheduling fee not to exceed \$75.00 per party, which shall be credited against the eventual fee for the mediation. In the event this order is withdrawn for reasons other than the sustaining of an objection filed pursuant to the Plan, after the mediator has expended resources to schedule a mediation, the scheduling fee may be retained by the mediator. Unless otherwise agreed, the plaintiff or plaintiffs shall pay one-half of the mediation fee, and the defendant or defendants shall pay one-half of the fee. The parties shall arrange with the mediator to determine and pay the mediation fee before, at, or within five working days after the mediation session, or, in the case of a cancelled mediation, within thirty days following the cancellation. If a party is unable to pay the costs of mediation, application to incur such expenses, to be reimbursed from the Federal Practice Fund must be filed before the mediation session. Procedures and amounts are described in NEGenR 1.2(i), the Mediation Plan, Paragraph 3(b), and the Guidelines for Administration of the Federal Practice Fund, Paragraphs III. A., VI. E, and VI. G. Judgment for the mediator may be entered for payment of fees or expenses, whether or not the mediation is successful, without advance notice if fees or expenses are not timely paid.

8. Pending completion of the mediation, all activity in this case (including compliance with all deadlines in the progression orders, responses to discovery and pending motions, and attendance at pretrial or other scheduled conferences) is stayed for ninety (90) days.

9. Pursuant to General Order 2005-21, all pending motions are hereby denied, without prejudice to their refiling in the event the mediation is not successful.

10. The Clerk shall bring this file to the attention of the undersigned after one hundred (100) days or when notified that the mediation has been completed, whichever first occurs.

11. The Clerk is directed to provide a copy of this order to all counsel of record and unrepresented parties, and to the mediator designated above, enclosing with the latter a copy of the relevant pleadings and the docket sheet for this case which lists the names of the parties and counsel of record.

DATED this ____ day of _____, 200__.

BY THE COURT:

s/ David L. Piester
United States Magistrate Judge

(03/06)